



Brussels, 31.10.2017  
COM(2017) 637 final

2015/0288 (COD)

Amended proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on certain aspects concerning contracts for the ~~online and other distance~~ sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council**

(Text with EEA relevance)

{SWD(2017) 354 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

On 9 December 2015 the Commission adopted a proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content<sup>1</sup>, and a proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods<sup>2</sup>. These proposals aim to contribute to fostering growth through the creation of a true Digital Single Market, to the benefit of both consumers and businesses, by eliminating the key contract law-related barriers hindering cross-border trade.

With this amended proposal, the Commission proposes to extend the scope of the proposal for a Directive on certain aspects concerning contracts for the online<sup>3</sup> and other distance sales of goods to cover also face-to-face sales.

Against the background of the fast pace of commercial and technical change due to digitalisation, the Commission in its original proposal aimed to urgently tackle the key obstacles that hamper cross-border commerce. It therefore presented as a matter of priority a proposal dealing only with online and other distance sales of goods. In the Communication accompanying the proposal the Commission indicated that: *"Given the increasing importance of the omni-channel distribution model [...], the Commission will take all necessary steps to align the rules for online and offline sales of goods. It will ensure that consumers and businesses will be able to rely on a coherent legal framework."*<sup>4</sup> To ensure this coherence, the Commission committed to provide the co-legislators with data concerning face-to-face sales that it was collecting in the context of the REFIT Fitness Check of the main EU consumer law directives, which included also Directive 1999/44/EC on consumer sales and guarantees (CSGD)<sup>5</sup>. In the Communication the Commission further highlighted that the conclusions of this exercise *"could feed into the progress made by the co-legislators on the proposal for online sales of goods, for instance by expanding its scope."*<sup>6</sup> The relevant data collected by the Commission within the Fitness Check exercise were transmitted to the co-legislators in August-September 2016 and subsequently published in May 2017.<sup>7</sup>

During the discussions on the proposal in the European Parliament (EP) and in the Council, the co-legislators have stressed the need to have coherent rules for distance and face-to-face sales. The EP rapporteurs of both the lead committee for the Internal Market and Consumer protection (IMCO) and the associated committee for Legal Affairs (JURI) for the proposal on online and other distance sales have tabled amendments which extend its scope to all contracts of sale concluded between a seller and a consumer. In that context, IMCO requested the European Parliamentary Research Service to conduct an ex-ante impact assessment in order to assess the impacts of these amendments. This EP impact assessment was published

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1 COM(2015) 634 final.

2 COM(2015) 635 final.

3 For the purpose of this Explanatory Memorandum, any reference to "online sales" shall be understood as "online and other distance sales"

4 COM (2015) 633final, p.8.

5 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p.12.

6 COM (2015) 633final, p.8..

7 SWD(2017)209 final. The Report on the Fitness Check of consumer and marketing law and the external supporting studies are available at: [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59332&ticket=ST-25614682-e2tNLEtewXUap6Gbc0Wzg4NGelXRUC7OXD3BkwIM0NNPzQKuVog4GztcwvMf4lakPH7LHq5oI9Z1Qp4vLHcpm-Jj71zxYb8yr4dh9M8XMrC8-AOP82AjNmHaQXuUINLKghPW4zVIoMFwYYx6y0wJxqAI](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332&ticket=ST-25614682-e2tNLEtewXUap6Gbc0Wzg4NGelXRUC7OXD3BkwIM0NNPzQKuVog4GztcwvMf4lakPH7LHq5oI9Z1Qp4vLHcpm-Jj71zxYb8yr4dh9M8XMrC8-AOP82AjNmHaQXuUINLKghPW4zVIoMFwYYx6y0wJxqAI)

on 14 July 2017 and its conclusions support the need to have coherent rules for all sales, which would benefit both businesses and consumers<sup>8</sup>.

At the informal Justice and Home Affairs Council meeting on 7 July 2017 as well as within the Working Group on Civil Law Matters (Contract Law) in the Council the vast majority of Member States have expressed reservations as regards the legal fragmentation that would result from different regimes for the distance and the face-to-face sales of goods, arguing that the rules applicable for sales of goods need to be the same regardless of the sales channel. Consequently, a number of Member States have expressed their view that the Commission should present an amended proposal to extend the scope also to face-to-face sales.

Furthermore, this amended proposal aims to facilitate timely progress in a field which lies in the heart of the Single Market strategies, in line with the conclusions of the European Council: In June 2016 the European Council called *"for the different Single Market strategies...to be completed and implemented by 2018."*<sup>9</sup> And in June 2017 the European Council emphasised that *"further efforts are needed from the EU and its Member States to achieve the level of ambition as reflected in the June 2016 conclusions for the Single Market... The Council will report to the June 2018 European Council on progress in deepening, implementing and enforcing the Single Market in all its aspects."*<sup>10</sup>

By presenting this amended proposal which extends the scope of its original proposal to face-to-face sales, the Commission responds to the above-mentioned developments in the inter-institutional negotiations, taking into account the findings of the Fitness Check<sup>11</sup> and the impact assessment conducted by the European Parliament Research Service, as presented in detail in the Staff Working Document accompanying the amended proposal.<sup>12</sup>

- **Reasons for and objectives of the proposal**

The impact assessment of the original proposal outlined the problems faced by both consumers and businesses resulting from differences in national contract laws. The minimum harmonisation approach of the CSGD does not encourage consumers to buy from other EU countries or businesses to sell to other EU countries.<sup>13</sup> This prevents consumers and businesses from benefiting to the full from the opportunities of the internal market. The Fitness Check evaluation confirmed the need for retaining consistent rules in this area that apply to both distance and face-to-face sales.<sup>14</sup>

Whilst since the adoption of the proposal by the Commission consumers' confidence in cross-border online purchases – which make up the bulk of cross-border trade of consumer goods – has increased, it is still lower than their confidence in domestic purchases<sup>15</sup>. One of the main concerns of consumers with regard to cross-border e-commerce is the uncertainty about their

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8 [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_STU%282017%29603258](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU%282017%29603258).

9 EUCO 26/16, [http://www.consilium.europa.eu/press-releases-pdf/2016/6/47244643506\\_en.pdf](http://www.consilium.europa.eu/press-releases-pdf/2016/6/47244643506_en.pdf)

10 EUCO 8/17, [http://www.consilium.europa.eu/press-releases-pdf/2017/6/47244661590\\_en.pdf](http://www.consilium.europa.eu/press-releases-pdf/2017/6/47244661590_en.pdf).

11 SWD(2017)209 final, Report of the Fitness Check of consumer and marketing law.

12 SWD (2017) 354 final, Impacts of fully harmonised rules on contracts for the sales of goods.

13 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p.78.

14 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p.62-65.

15 72.4 % of consumers are confident to buy domestically while 57.8 % are confident buying cross-border. Consumer Conditions Scoreboard–2017 Edition, available at: [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=117250](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=117250).

key contractual rights.<sup>16</sup> Also, the increased consumer confidence has not translated into an equally strong increase of actual cross-border purchases.<sup>17</sup>

Businesses' confidence in selling cross-border is still not improving. According to the latest EU-wide survey (2016), 58 % of all EU retailers declare being confident selling online; however, only 28% are confident to sell online to other EU countries, while 30% report being confident only in selling to consumers in their own country.<sup>18</sup> The role played by different national contract laws as one of the main obstacles to cross-border sales highlighted in the impact assessment accompanying the original proposal is confirmed by this new data: two out of the four most important obstacles to cross-border trade for retailers currently selling online relate to differences in national contract law (38.1%) and differences in national consumer protection rules (37.4%).<sup>19</sup> These concerns are reflected in persistently low levels of actual cross-border e-commerce uptake by retailers.<sup>20</sup>

Differences in national consumer contract laws also affect businesses and consumers engaged in face-to-face cross-border sales: the analysis carried out in the context of the Fitness Check of EU consumer and marketing law shows that 42 % of retailers selling face-to-face and 46 % of retailers using distance sales channels consider the costs of compliance with varying consumer protection and contract law rules as important barriers to their cross-border sales.<sup>21</sup> At the same time, the recent REFIT Fitness Check data show that for 72 % of consumers, differences in consumer rights for faulty products are an important or very important factor to consider when buying face-to-face in another EU country.<sup>22</sup>

The objective of the original proposal was therefore to eliminate the key contract law-related barriers hindering cross-border trade in order to remove the problems faced by businesses and consumers due to the complexity of the legal framework and the costs incurred by businesses resulting from differences in contract law.

This amended proposal which applies to all sales is geared towards this same objective and contributes even more to it since traders selling or considering selling face-to-face cross-border are likewise affected by the uncertainties and costs stemming from different national contract laws, which in turn results in fewer cross-border sales as well as less choice and less competitive prices for consumers. In addition, this amended proposal avoids negative impacts on traders selling nationally both at a distance as well as face-to-face which would result from different national contract law regimes applying to the different distribution channels. Therefore, the proposal caters for the trend of increased omni-channel sales and responds to market developments, both for consumers and businesses.

- **Consistency with existing policy provisions in the policy area**

The key substantive provisions of the amended proposal cover the main differences of national consumer mandatory rules stemming from the Member States implementation of the minimum harmonisation rules of the CSGD. It is those main differences of national rules

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16 European Commission, Consumer survey identifying the main cross-border obstacles to the DSM and where they matter most, 2015.

17 Consumer Conditions Scoreboard–2017 Edition

18 Survey on retailers' attitudes towards cross-border trade and consumer protection 2016, p.120.

19 Survey on retailers' attitudes towards cross-border trade and consumer protection 2016 p.123-124. These obstacles were reported as most important right after the "higher risk of fraud and non-payments in cross border sales" (39.7 %) and "differences in national tax regulations" (39.6 %).

20 Survey on retailers' attitudes towards cross-border trade and consumer protection 2016, p.105.

21 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p.100-101.

22 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law p.100.

which affect traders' decisions whether or to which extent to sell goods cross-border. While the proposal takes as a basis the rules of the CSGD, which is proposed to be repealed, it provides for a full harmonisation of the conformity criteria for the goods, of the hierarchy of the remedies available to consumers and of the modalities how to exercise these remedies.

The proposal supplements existing horizontal consumer protection legislation, in particular Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.<sup>23</sup> The two instruments would not overlap but function in a complementary manner, as Directive 2011/83/EU mainly includes provisions on pre-contractual information requirements, the right of withdrawal from distance and off-premises contracts and rules on delivery of goods and passing of risk, while the proposal on contracts for the sale of goods lays down rules on the conformity of the goods with the contract, the remedies available to consumers in the event of a lack of conformity and the modalities for the exercise of those remedies. The proposal is also consistent with the outcome of the Fitness Check of EU consumer and marketing law.<sup>24</sup>

The proposal is complemented by sector specific Union legislation, such as the Ecodesign<sup>25</sup> or Energy Labelling<sup>26</sup> legislation and their implementing and delegated acts, which introduce product specific durability requirements.

Finally, the proposal is compatible with Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>27</sup> and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)<sup>28</sup>, which provide rules to determine the competent jurisdiction and applicable law.

- **Consistency with other Union policies**

The proposal pertains to the measures proposed by the Commission in its Communication on a comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses.<sup>29</sup> Each of those measures contributes significantly to stimulating cross-border e-commerce in Europe and their combination forms a package of complementary and necessary elements to achieve the full benefits of increased cross-border e-commerce. In particular, the full harmonisation of key national contract law provisions should facilitate the implementation of the proposed Regulation on geoblocking<sup>30</sup> since it will remove one of the main reasons why businesses 'geo-block'.

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23 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p.64.

24 SWD(2017)209 final, Report of the Fitness Check of consumer and marketing law.

25 Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products, OJ L285, 31.10.2009, p.10 – 35.

26 Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, OJ L 153, 18.06.2010, p. 1 – 12.

27 OJ L 351, 20.12.2012, p. 1–32.

28 OJ L 177, 4.07.2008, p. 6

29 COM(2016)320 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses.

30 COM(2016)289 final, Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

The amended proposal is consistent with the proposal for a Directive on the supply of digital content. Both of them represent important contributions for unleashing the potential of the Digital Single Market, with the amended proposal being a very important part of this package as the sales of goods represents more than 80% of the total cross-border trade.<sup>31</sup>

In the Communication on the mid-term review on the implementation of the Digital Single Market Strategy<sup>32</sup> the Commission urged the European Parliament and the Council to timely adopt all of the proposed measures, given the need to remove remaining barriers rapidly and to make a functional Digital Single Market a reality.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

### **• Legal basis**

The legal basis of this modified proposal is Article 114 of the Treaty on the Functioning of the European Union and its main objective is the improvement of the establishment and the functioning of the internal market.

As explained under Section 1, the minimum harmonisation character of the CSGD has led to differences in consumer contract law rules, resulting from national mandatory rules going beyond the minimum standards laid down in the CSGD<sup>33</sup>. Those differences create obstacles to cross-border trade and therefore have a direct effect on the establishment and functioning of the internal market and limit competition. The proposal will remove obstacles to the exercise of fundamental freedoms which result from these differences, in particular from the additional transaction costs when concluding cross-border transactions and the lack of confidence in their rights experienced by consumers when purchasing from another EU country. All of these factors have a direct effect on the establishment and functioning of the internal market and limit competition and show that the minimum harmonisation character of the CSGD has not been sufficient to tackle the internal market aspects of cross-border consumer sales of goods within the Union.

Repealing the existing minimum harmonisation CSGD and replacing it with a full harmonisation Directive with an extended scope, covering both distance and face-to-face sales, will contribute to a coherent legal framework supporting a functioning internal market. The proposal will guarantee an overall high EU level of consumer protection by providing a set of fully harmonised mandatory rules which maintain and in a number of cases improve the level of protection that consumers currently enjoy under the CSGD.

### **• Subsidiarity**

The modified proposal complies with the subsidiarity principle as set out in Article 5 of the Treaty on European Union.

The objective of removing consumer contract law barriers and thereby promoting the internal market for the benefit of businesses and consumers cannot be adequately achieved by the

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31 Impact assessment accompanying the digital contracts proposals, SWD (2015) 274 final, p.5.

32 COM(2017)228 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy - A Connected Digital Single Market for All..

33 That information is mainly drawn from the notifications by Member States to the Commission according to Articles 32 and 33 of Directive 2011/83/EU regarding the transposition of Council Directive 93/13/EEC and Directive 1999/44/EC; for full notifications see: [http://ec.europa.eu/consumers/consumer\\_rights/rights-contracts/directive/notifications/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/rights-contracts/directive/notifications/index_en.htm).

Member States. Rules on the sales of goods in the CSGD are of minimum harmonisation nature and therefore allow for different implementation by the Member States. This has led to differing national rules and consequently transaction costs for cross-border sales. Only a coordinated intervention at the Union level aiming at removing existing diverging national approaches in the European Union consumer laws by way of full harmonisation can contribute to the completion of the internal market by solving this problem.

An initiative at EU level will secure the development of consumer contract law in a coherent manner while ensuring that all consumers in the EU benefit from the same high level of consumer protection. It will create legal certainty for businesses which want to sell their goods in other Member States. Such a result can only be achieved by an action at the EU level. The proposal will fully harmonise certain key consumer contractual remedies and the conditions for their exercise. Thus it will create a single set of rules ensuring that, whether domestically or cross-border, at a distance or face-to-face, consumers enjoy the same high level of consumer protection across the European Union and traders can sell to consumers in all Member States based on the same contractual terms. The proposal would thus significantly reduce traders' compliance costs while maintaining an overall high EU level of consumer protection and increasing consumers' welfare through better choice of goods and lower prices.

As also highlighted in the impact assessment commissioned by the European Parliament, action at EU level, in particular action also encompassing face-to-face sales, would be more effective than action at national level. All opinions received by national parliaments on the proposal for online and other distance sales of goods opposed a possible creation of different rules for distance and face-to-face sales of goods.<sup>34</sup>

The full harmonisation approach has already proven successful in the area of EU consumer protection legislation, in particular through the rules of Directive 2011/83/EU, by ensuring a set of uniform consumer rights for all consumers within the European Union which are interpreted and enforced in a uniform way in all Member States.

The proposal will also provide a consistent legal basis for coordinated enforcement actions under the Regulation<sup>35</sup> on cooperation of national authorities responsible for the enforcement of consumer protection laws, and enforcement actions would be largely facilitated by the proposed uniform fully harmonised rules. Thus the enforcement of EU legislation will be strengthened for the benefit of EU consumers. Such a result can only be achieved by an action at the EU level.

- **Proportionality**

The modified proposal complies with the principle of proportionality as set out in Article 5 of the Treaty on European Union because the proposal will not go beyond what is necessary for the achievement of the objectives.

The proposal will not harmonise all aspects concerning contracts for the sales of goods. It focusses on further harmonising only those targeted, key mandatory consumer EU contractual rights which are essential in cross-border transactions, and which have been identified as

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34 National parliaments of DE, CZ, IE, FR, IT, LI, NL, AT, PT and RO submitted opinions. For the opinions, please see: [http://ec.europa.eu/dgs/secretariat\\_general/relation/relation\\_other/npo/index\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/relation/relation_other/npo/index_en.htm).

35 Regulation (EC) no. 2006/2004 of the European Parliament and of the Council on cooperation of national authorities responsible for the enforcement of consumer protection laws, OJ 364, 9.12.2004

barriers to trade by stakeholders and are necessary to build consumer trust. Moreover, the choice of the legal form of a Directive instead of a Regulation will have as a result considerably less interference into national laws (see below under "Choice of the instrument").

- **Choice of the instrument**

The choice of a Directive leaves Member States freedom to adapt the implementation to their national law whilst securing simple and modern rules that remove contract law barriers and create a level playing field for businesses as well as at the same time ensuring that consumers benefit from a high level of consumer protection all over the EU.

A Regulation would require a much more detailed and comprehensive regime than a Directive in order to allow its effects to be directly applicable. This would have as a consequence considerably more interference into national laws.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Stakeholder consultations**

#### *Consultation process*

The original proposal was preceded by an extensive consultation process which was based on a mix of public and targeted consultations. The Commission sought a wide and balanced range of views by giving the opportunity to all relevant parties (businesses, consumers, national authorities, lawyers and academics) to express their opinions.<sup>36</sup> The findings of these consultations are found in COM(2015)635 final.

Following the adoption of the original proposal, the Commission further consulted stakeholders in the course of the Fitness Check that covered also the CSGD and took account of the views expressed on the proposal on online and other distance sales of goods. Stakeholder involvement included a public online consultation which ran from May to September 2016, several targeted consultation activities carried out by external contractors in connection with the preparation of supporting studies between April 2016 and January 2017 and discussions within a dedicated stakeholder expert consisting of the main European and national consumer and business organisations. The findings of these consultations are found in SWD(2017)209 final and in the relevant supporting study on the costs and benefits of minimum harmonisation under the CSGD and of potential full harmonisation and alignment of EU rules for different sales channels<sup>37</sup>.

Stakeholders have repeatedly emphasised the need to maintain coherence between consumer contract law rules applicable for distance and face-to-face sales. In the public consultation preceding the adoption of the digital contracts proposals participating Member States, business associations and consumer organisations warned against the negative effects of a possible divergence of rules applicable to distance and face-to-face sales of goods. The above-mentioned study<sup>38</sup> supporting the Fitness Check also confirmed that national authorities,

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36 For more details about the consultations, please see: [http://ec.europa.eu/justice/newsroom/contract/opinion/index\\_en.htm](http://ec.europa.eu/justice/newsroom/contract/opinion/index_en.htm)

37 [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59332](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332)

38 Study on the costs and benefits of the minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels, p.44.



business and consumer organisations alike strongly support retaining a single set of rules on face-to-face and distance consumer sales. They believe that this would improve transparency, reduce complexity and make the system easier to understand for both consumers and traders. This would also make it easier to buy and sell across borders, boost competition, cut traders' compliance costs and reduce prices for consumers.

- **Impact assessment**

An impact assessment has been carried out for the original proposal and an impact assessment report and an executive summary were published with the original proposal.<sup>39</sup>

In the Staff Working Document accompanying the amended proposal the Commission has supplemented this impact assessment with an analysis of the findings and data gathered through the Fitness Check and taking into account the impact assessment prepared by the European Parliamentary Research Service.<sup>40</sup> In addition, the Commission also considered the latest data published in the 2017 edition of the Consumer Conditions Scoreboard, which is based on dedicated representative surveys of consumers and retailers in all EU countries.<sup>41</sup> The Staff Working Document presents a comprehensive overview of the impacts of fully harmonised rules on contracts for the sales of goods for businesses, consumers and ultimately for Member States and the EU digital and internal market.

The Commission's analysis shows that problems arising from different national rules implementing the CSGD are relevant both for distance sales and for face-to-face sales. The Fitness Check, which received a positive opinion from the Regulatory Scrutiny Board on 2 May 2017,<sup>42</sup> confirms the Commission's policy choices in the proposal on distance sales of goods and emphasises that consistency in the legal regimes for distance and face-to-face sales would have an overall positive effect on consumers and businesses in the single market.<sup>43</sup>

- **Fundamental rights**

The modified proposal will impact positively a number of rights protected under the EU Charter of Fundamental Rights, in particular Article 38 on consumer protection and Article 16 on the freedom to conduct a business.

A set of fully harmonised rules for distance and face-to-face sales of goods will ensure a fully harmonised high level of consumer protection throughout the EU in conformity with Article 38 of the Charter of Fundamental Rights by providing consumers with clear and specific rights when they buy goods domestically or from other Member States. While these rules will replace the current national rules that exist for goods which could lower on one or two points the level of protection consumers enjoy in a few Member States, this is outbalanced by increases of consumer protection compared to existing national laws on other points.

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39 The impact assessment report and the executive summary are available at [http://ec.europa.eu/justice/contract/digital-contract-rules/index\\_en.htm](http://ec.europa.eu/justice/contract/digital-contract-rules/index_en.htm)

40 SWD (2017) 354final, Impacts of fully harmonised rules on contracts for the sales of goods.

41 Consumer Conditions Scoreboard, 2017 Edition.

42 2016/JUST/023, available at [https://ec.europa.eu/info/publications/fitness-check-consumer-and-marketing-law\\_en](https://ec.europa.eu/info/publications/fitness-check-consumer-and-marketing-law_en).

43 Executive Summary of the study on the costs and benefits of minimum harmonisation under the CSGD and of potential full harmonisation of selected consumer protection areas.

A set of fully harmonised rules for distance and face-to-face sales of goods will also contribute to achieving the objective of Article 16 because businesses will find it easier to sell goods in the EU. Their ability to expand their business will therefore be reinforced.

Finally, clear contract law rights may help to fulfil the objective of Article 47 (Right to an effective remedy) because it may increase the ability to exercise one's right to an effective remedy before the courts. The new rules should clarify the remedies available in case of disputes.

#### **4. BUDGETARY IMPLICATIONS**

The amended proposal will not have any budgetary implications

#### **5. OTHER ELEMENTS**

- **Explanation of the specific provisions of the modified proposal**

The amended proposal extends the scope of the original proposal which was limited to online and other distance sales to face-to-face sales. The changes to the original proposal consist of the technical amendments required for the extension of the scope of the proposal and the repeal of Directive 1999/44/EC, namely deleting references to 'online and other distance sales', adding a provision on the repeal of Directive 1999/44/EC, including a temporal clarification regarding the contracts that will be covered by the implementation measures of the modified proposal and adding certain provisions of Directive 1999/44/EC which are necessary for the completeness of this Directive, as a result of the repeal of Directive 1999/44/EC, such as the definition of 'producer'. Finally, a number of technical amendments to improve consistency and clarity of the legal text were also introduced.

The amendments concern recitals 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 21, 22, 23, 26, 28, 30, 34, 37, 38 and 42. The previous recital 4 was deleted and previous recitals 5, 6 and 7 were re-numbered to 4, 5 and 6 respectively, while a new recital 7 was introduced. Amendments in the legal text concern Articles 1, 2, 15 and 19, while new Articles 20 and 21 were introduced. The previous Articles 20, 21 and 22 were re-numbered to Articles 22, 23 and 24 respectively.

Amended proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on certain aspects concerning contracts for the ~~online and other distance~~ sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,  
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>44</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) In order to remain competitive on global markets, the Union needs to improve the functioning of the internal market and successfully answer the multiple challenges raised today by an increasingly technologically-driven economy. The Digital Single Market Strategy<sup>45</sup> lays down a comprehensive framework facilitating the integration of the digital dimension into the Single internal Mmarket. The first pillar of the Strategy tackles fragmentation in intra-EU trade by approaching all major obstacles to the development of cross-border e-commerce, which constitutes the most significant part of cross-border business-to-consumer sales of goods.
- (2) For the ~~achievement~~ good functioning of a ~~genuine digital single~~ the internal market, the harmonisation of certain aspects concerning contracts for sales of goods, taking as a base a high level of consumer protection, is necessary.
- (3) E-commerce is one of the the main drivers for growth within the Digital Single internal Mmarket. However its growth potential is far from being fully exploited. In order to strengthen Union competitiveness and to boost growth, the Union needs to act swiftly and encourage economic actors to unleash the full potential offered by the Digital Single internal Mmarket. The full potential of the Digital Single internal Mmarket can only be unleashed if all market participants enjoy smooth access to the online cross-border sales of goods, and are able to confidently engage including in e-commerce transactions. The contract law rules on the basis of which market participants conclude transactions are among the key factors shaping business'

<sup>44</sup> OJ C 264, 20.7.2016, p. 57.

<sup>45</sup> COM(2015) 192 final.

decisions whether to offer goods ~~online~~ cross-border. Those rules also influence consumers' willingness to embrace and trust this type of purchase.

- ~~(4) While online sales of goods constitute the vast majority of distance sales in the Union, this Directive should cover all distance sales channels, including phone and mail orders, in order to avoid any unjustified distortions of competition and to create a level playing field for all businesses selling at a distance.~~
- (54) The Union rules applicable to the ~~online and other distance~~ sales of goods are still fragmented although rules on pre-contractual information requirements, the right of withdrawal for distance contracts and delivery conditions have already been fully harmonised. Other key contractual elements such as the conformity criteria, the remedies and modalities for their exercise for goods which do not conform to the contract are currently subject to minimum harmonisation in Directive 1999/44/EC of the European Parliament and of the Council<sup>46</sup>. Member States have been allowed to go beyond the Union standards and introduce rules that ensure even higher level of consumer protection. Having done so, they have acted on different elements and to different extents. Thus, national provisions transposing ~~the Union legislation on consumer contract law~~ Directive 1999/44/EC significantly diverge today on essential elements ~~of a sales contract~~, such as the absence or existence of a hierarchy of remedies, the period of the legal guarantee, the period of the reversal of the burden of proof, or the notification of the defect to the seller.
- ~~(65)~~ Existing disparities may adversely affect businesses and consumers. Pursuant to Regulation (EC) No 593/2008 of the European Parliament and of the Council<sup>47</sup>, businesses directing activities to consumers in other Member States need to take account of the mandatory consumer contract law rules of the consumer's country of habitual residence. As these rules differ among Member States, businesses may be faced with additional costs. Consequently many businesses may prefer to continue trading domestically or only export to one or two Member States. That choice of minimising exposure to costs and risks associated with cross-border ~~e-commerce~~ trade results in lost opportunities of commercial expansion and economies of scale. Small and medium enterprises are in particular affected.
- ~~(76)~~ While consumers enjoy a high level of protection when they purchase ~~online or otherwise at a distance~~ from abroad as a result of the application of Regulation (EC) No 593/2008, fragmentation also impacts negatively on consumers' levels of confidence in ~~e-commerce~~ cross-border transactions. While several factors contribute to this mistrust, uncertainty about key contractual rights ranks prominently among consumers' concerns. This uncertainty exists independently of whether or not consumers are protected by the mandatory consumer contract law provisions of their own Member State in the case where a seller directs his cross-border activities to them or whether or not consumers conclude cross-border contracts with a seller without the respective seller pursuing commercial activities in the consumer's Member State.
- ~~(7)~~ While online sales of goods constitute the vast majority of cross-border sales in the Union, differences in national contract laws equally affect retailers using distance sales channels and retailers selling face-to-face and prevent them from expanding across borders. This Directive should cover all sales channels, in order to create a level

46 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees OJ L 171, 7.7.1999, p.12.

47 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L177, 4.7.2008, p.6.

playing field for all businesses selling goods to consumers. By laying down uniform rules across sales channels, this Directive should avoid any divergence that would create disproportionate burdens for the growing number of omni-channel retailers in the Union. The need for retaining consistent rules on sales and guarantees for all sales channels was confirmed in the Fitness Check of EU consumer and marketing law, which also covered Directive 1999/44/EC.<sup>48</sup>

- (8) In order to remedy ~~these~~ problems due to the fragmentation of national rules, businesses and consumers should be able to rely on a set of fully harmonised, targeted rules for the ~~online and other distance~~ sales of goods. Uniform rules are necessary in relation to several essential elements of consumer contract law which under the current minimum harmonisation approach led to disparities and trade barriers across the Union. Therefore, this Directive should repeal the minimum harmonisation Directive 1999/44/EC and introduce fully harmonised rules on contracts for the sales of goods.
- (9) Fully harmonised consumer contract law rules will make it easier for traders to offer their products in other Member States. Businesses will have reduced costs as they will no longer need to take account of different consumer mandatory rules. They will enjoy more legal certainty when selling ~~at a distance~~ to other Member States through a stable contract law environment.
- (10) Increased competition among retailers is likely to result in wider choices at more competitive prices being offered to consumers. Consumers will benefit from a high level of consumer protection and welfare gains through targeted fully harmonised rules. This in turn would increase their trust in the cross-border commerce ~~at a distance and in particular online~~. Consumers will more confidently buy ~~at a distance~~ cross-border knowing they would enjoy the same rights across the Union.
- (11) This Directive covers rules applicable to the ~~online and other distance~~ sales of goods only in relation to key contract elements needed to overcome contract-law related barriers in the Digital Single internal Mmarket. For this purpose, rules on conformity requirements, remedies available to consumers for lack of conformity of the goods with the contract and modalities for their exercise should be fully harmonised and the level of consumer protection as compared to Directive 1999/44/EC, should be increased.
- (12) Where a contract includes elements of both sales of goods and provision of services, theis Directive should apply only to the part relating to the sale of goods in line with the approach taken by Directive 2011/83/EU of the European Parliament and of the Council.<sup>49</sup>
- (13) This Directive should not apply to goods like DVDs and CDs incorporating digital content in such a way that the goods function only as a carrier of the digital content. However, this Directive should apply to digital content integrated in goods such as

<sup>48</sup> Commission Staff Working Document(SWD(2017) 208 final), Report of the Fitness Check on Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests; Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

<sup>49</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p.64.

household appliances or toys where the digital content is embedded in such a way that its functions are subordinate to the main functionalities of the goods and it operates as an integral part of the goods.

- (14) This Directive should not affect contract laws of Member States in areas not regulated by this Directive. In addition, in certain areas regulated by this Directive Member States should also be free to provide lay down rules—more detailed conditions in relation to those aspects which are not regulated in this Directive to the extent those are not fully harmonised by this Directive: this concerns limitation periods for exercising the consumers' rights and commercial guarantees. Finally, in relation to, and the right of redress of the seller, Member States should be free to provide more detailed conditions on the exercise of such right.
- (15) ~~Where referring to the same concepts, †~~The rules of this Directive complement should be applied and interpreted in a manner consistent with the rules of Directive 1999/44/EC and Directive 2011/83/EU of the European Parliament and of the Council. While Directive 2011/83/EU of the European Parliament and of the Council mainly lays down provisions regarding pre-contractual information requirements, the right of withdrawal from distance and off-premises contracts and rules on delivery and passing of risk, this Directive introduces rules on conformity of the goods, remedies in the event of a lack of conformity and modalities for the exercise of such remedies as interpreted by the case law of the Court of Justice of the European Union.
- (16) For the purpose of legal clarity theis Directive should includes a definition of a sales contract. Thisat definition maintains should provide that contracts where goods are yet to be produced or manufactured, including under consumer's specifications, are also included in the scope of theis Directive.
- (17) In order to bring clarity and certainty for sellers and consumers theis Directive should define the notion of a contract. Thisat definition should follows the common traditions of all Member States by requiring an agreement intended to give rise to obligations or other legal effects for a contract to exist.
- (18) In order to balance the requirement of legal certainty with an appropriate flexibility of the legal rules, any reference to what can be expected of or by a person in this Directive should be understood as a reference to what can reasonably be expected. The standard of reasonableness should be objectively ascertained, having regard to the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the parties involved. In particular, the reasonable time for completing a repair or replacement should be objectively ascertained, having regard to the nature of the goods and the lack of conformity.
- (19) In order to provide clarity as to what a consumer can expect from the goods and what the seller would be liable for in case of failure to deliver what is expected, it is essential to fully harmonise rules for determining the conformity with the contract. Applying a combination of subjective and objective criteria should safeguard legitimate interests of both parties to a sales contract. Conformity with the contract should be assessed by taking into account not only requirements which have actually been set in the contract - including in pre-contractual information which forms an integral part of the contract - but also certain objective requirements which constitute the standards normally expected for goods, in particular in terms of fitness for the purpose, packaging, installation instructions and normal qualities and performance capabilities.

- (20) A large number of consumer goods are intended to be installed before they can be usefully used by the consumer. Therefore any lack of conformity resulting from an incorrect installation of the goods should be regarded as a lack of conformity with the contract where the installation was performed by the seller or under the seller's control, as well as where the goods were installed by the consumer but the incorrect installation is due to incorrect installation instructions.
- (21) Conformity should cover material defects as well as legal defects. Third party rights and other legal defects might effectively bar the consumer from enjoying the goods in accordance with the contract when the rights's holder rightfully compels the consumer to stop infringing those rights. Therefore the seller should ensure that the goods are free from any right of a third party, which precludes the consumer from enjoying the goods in accordance with the contract.
- (22) While freedom of contract with regard to the criteria of conformity with the contract should be ensured, in order to avoid circumvention of the liability for lack of conformity and ensure a high level of consumer protection, any derogation from the mandatory rules on criteria of conformity and incorrect installation, which is detrimental to the interests of the consumer, ~~shall~~should be valid only if the consumer has been expressly informed and has expressly consented to it when concluding the contract.
- (23) Ensuring longer durability of consumer goods is important for achieving more sustainable consumption patterns and a circular economy. Similarly, keeping non-compliant products out of the Union market by strengthening market surveillance and providing the right incentives to economic operators is essential to increase trust in the functioning of the single internal market. For these purposes, product specific Union legislation is the most appropriate approach to introduce durability and other product related requirements in relation to specific types or groups of products, using for this purpose adapted criteria. This Directive should therefore be complementary to the objectives followed in ~~this such~~ Union sector product specific legislation. In so far as specific durability information is indicated in any pre-contractual statement which forms part of the sales contract, the consumer should be able to rely on them as a part of the criteria for conformity.
- (24) Enhancing legal certainty for both consumers and sellers requires a clear indication of the time when the conformity of the goods to the contracts should be assessed. In order to ensure coherence between the present Directive and Directive 2011/83/EU it is appropriate to indicate the time of the passing of risk as the time for assessing the conformity of the goods. However, in cases where the goods need to be installed, that relevant time should be adapted.
- (25) The optional possibility for Member States to maintain notification obligations for consumers may lead them to easily lose well-substantiated claims for remedies in case of delayed or lack of notification, especially in a cross-border transaction where a law of another Member State applies and the consumer is not aware of this notification obligation resulting from the law of another Member State. Therefore a notification obligation for consumers should not be established. Accordingly, Member States should be prevented from introducing or maintaining a requirement for the consumer to notify the seller the lack of conformity within a certain deadline.
- (26) In order to allow businesses to rely on a single set of rules across the Union, it is necessary to fully harmonise the period of time during which the burden of proof for the lack of conformity is reversed in favour of the consumer. Within the first two

years, in order to benefit from the presumption of lack of conformity, the consumer should only ~~establish~~ demonstrate that the good is not conforming, without also needing to demonstrate that the lack of conformity actually existed at the relevant time for establishing conformity. In order to increase legal certainty in relation to available remedies for lack of conformity with the contract and in order to eliminate one of the major obstacles inhibiting the ~~Digital Single~~ internal ~~M~~market, a fully harmonised order in which remedies can be exercised should be provided for. In particular, the consumer should enjoy a choice between repair or replacement as a first remedy which should help in maintaining the contractual relation and mutual trust. Moreover, enabling consumers to require repair should encourage a sustainable consumption and could contribute to a greater durability of products.

- (27) The consumer's choice between repair and replacement should only be limited where the option chosen would be disproportionate compared to the other option available, impossible or unlawful. For instance, it might be disproportionate to request the replacement of goods because of a minor scratch where this replacement would create significant costs while, at the same time, the scratch could easily be repaired.
- (28) Where the seller has not remedied the lack of conformity through repair or replacement without significant inconvenience for the consumer and within a reasonable time, the consumer should be entitled to a price reduction or to terminate the contract. In particular any repair or replacement ~~needs to~~ should be successfully accomplished within this reasonable period. What is a reasonable time should be objectively ascertained considering the nature of the goods and the lack of conformity. If upon the lapse of the reasonable period, the seller has failed to successfully remedy the lack of conformity, the consumer should not be obliged to accept any further attempts by the seller in relation to the same lack of conformity.
- (29) Considering that the right to terminate the contract due to the lack of conformity is an important remedy applicable where repair or replacement are not feasible or have failed, the consumer should also enjoy the right to terminate the contract in cases where the lack of conformity is minor. This would provide a strong incentive to remedy all cases of a lack of conformity at an early stage. In order to make the right to terminate effective for consumers, in situations where the consumer acquires multiple goods, some being an accessory to the main item which the consumer would not have acquired without the main item, and the lack of conformity impacts that main item, the consumer should have the right to terminate the contract also in relation to the accessory elements, even if the latter are in conformity with the contract.
- (30) Where the consumer terminates the contract due to the lack of conformity, this Directive should prescribe only the main effects and modalities of the right of termination, in particular the obligation for the parties to return what they have received. Thus, the seller ~~shall~~ should be obliged to refund the price received from the consumer and the consumer ~~shall~~ should return the goods.
- (31) In order to ensure the effectiveness of the right to terminate for consumers while avoiding the consumer's unjustified enrichment, the consumer's obligation to pay for the decrease of the value of the goods should be limited to those situations where the decrease exceeds normal use. In any case the consumer should not be obliged to pay more than the price agreed for the goods. In situations where the return of the goods is impossible due to their destruction or loss, the consumer should pay the monetary value of the goods which were destroyed. However, the consumer should not be



obliged to pay the monetary value where the destruction or loss is caused by the lack of conformity of the goods with the contract.

- (32) In order to increase legal certainty for sellers and overall consumer confidence in cross-border purchases it is necessary to harmonise the period during which the seller is held liable for any lack of conformity which exists at the time when the consumer acquires the physical possession of goods. Considering that the large majority of Member States have foreseen a two-year period when implementing Directive 1999/44 and in practice this is considered by market participants as a reasonable period, this period should be maintained.
- (33) In order to ensure higher awareness of consumers and easier enforcement of the Union rules on consumer's rights in relation to non-conforming goods, this Directive should align the period of time during which the burden of proof is reversed in favour of the consumer with the period during which the seller is held liable for any lack of conformity.
- (34) In order to ensure transparency, certain transparency requirements for commercial guarantees should be provided. Moreover in order to improve legal certainty and to avoid that consumers are misled, this Directive should provide that where commercial guarantee conditions contained in advertisements or pre-contractual information are more favourable to the consumer than those included in the guarantee statement the more advantageous conditions should prevail. Finally, this Directive should provide rules on the content of the guarantee statement and the way it should be made available to consumers. Member States should be free to lay down rules on other aspects of commercial guarantees not covered by this Directive, provided that those rules do not deprive consumers of the protection afforded to them by the fully harmonised provisions of this Directive on commercial guarantees.
- (35) Considering that the seller is liable towards the consumer for any lack of conformity of the goods resulting from an act or omission of the seller or a third party it is justified that the seller should be able to pursue remedies against the responsible person earlier in the chain of transactions. However, this Directive should not affect the principle of freedom of contract between the seller and other parties in the chain of transactions. The details for exercising that right, in particular against whom and how such remedies are to be pursued, should be provided by the Member States.
- (36) Persons or organisations regarded under national law as having a legitimate interest in protecting consumer contractual rights should be afforded the right to initiate proceedings, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings.
- (37) Nothing in this Directive should prejudice the application of rules of private international law, in particular Regulation (EC) No 593/2008 and Regulation (ECU) No 1215/2012 of the European Parliament and of the Council<sup>50</sup>.
- (38) Directive 1999/44/EC should be amended to exclude distance sales contracts from its scope of application repealed. The date of repeal should be aligned with the transposition date of this Directive. In order to ensure a uniform application of the laws, regulations and administrative provisions necessary for Member States to comply with this Directive to contracts concluded from the transposition date onwards, this Directive should not apply to contracts concluded before its transposition date.

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Regulation (ECU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351, 20.12.2012, p.1.

- (39) Regulation (EC) No 2006/2004 of the European Parliament and of the Council<sup>51</sup> should be amended to include a reference to this Directive in its Annex so as to facilitate cross-border cooperation on enforcement of this Directive.
- (40) Directive 2009/22/EC of the European Parliament and of the Council<sup>52</sup> should be amended to include a reference to this Directive in its Annex so as to ensure that the consumers' collective interests laid down in this Directive are protected.
- (41) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents<sup>53</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (42) ~~Since~~ ~~€~~ The objectives of this Directive, namely to contribute to the functioning of the internal market by tackling in a consistent manner contract law-related obstacles for the ~~online and other distance~~ sales of goods across borders in the Union, cannot be sufficiently achieved by the Member States, as each Member State individually is not in a position to tackle the existing legal fragmentation by ensuring the coherence of its legislation with other Member States' legislations. The objectives of this Directive but can rather be better achieved at Union level by removing the identified contract law-related obstacles through full harmonisation.; Therefore, in order to achieve the objectives of this Directive the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (43) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and specifically Article 16, 38 and 47 thereof.

HAVE ADOPTED THIS DIRECTIVE:

### *Article 1*

#### **Subject matter and scope**

1. This Directive lays down certain requirements concerning ~~distance~~ sales contracts concluded between the seller and the consumer, in particular rules on conformity of goods, remedies in case of non-conformity and the modalities for the exercise of ~~these~~ remedies.
2. This Directive shall not apply to ~~distance~~ contracts for the provision of services. However, in case of sales contracts providing both for the sale of goods and the provision of services, this Directive shall apply to the part relating to the sale of goods.

51 Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws ~~OJ L 165, 18.06.2013 OJ 364, 9.12.2004~~, p.1.

52 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests OJ L110, 1.05.2009, p.30.

53 OJ C 369, 17.12.2011, p. 14.

3. This Directive shall not apply to any  ~~durable~~ tangible medium incorporating digital content where the  ~~durable~~ tangible medium has been used exclusively as a carrier for the supply of the digital content to the consumer.
4. Member States may exclude from the scope of this Directive contracts for the sale of second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person.
45. In so far as not regulated therein, this Directive shall not affect national general contract laws such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract.

## *Article 2*

### **Definitions**

For the purpose of this Directive, the following definitions shall apply:

- (a) ‘sales contract’ means any contract under which the seller transfers or undertakes to transfer the ownership of goods, including goods which are to be manufactured or produced, to the consumer and the consumer pays or undertakes to pay the price thereof;
- (b) ‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;
- (c) ‘seller’ means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive;
- (d) ‘producer’ means the manufacturer of goods, the importer of goods into the Union or any person purporting to be a producer by placing their name, trade mark or other distinctive sign on the goods;
- (e) ‘goods’ means any tangible movable items with the exception of
  - (a) items sold by way of execution or otherwise by authority of law;
  - (b) water, gas and electricity unless they are put up for sale in a limited volume or a set quantity;
- ~~(f) ‘distance sales contract’ means any sales contract concluded under an organised distance scheme without the simultaneous physical presence of the seller and the consumer, with the exclusive use of one or more means of distance communication, including via internet, up to and including the time at which the contract is concluded;~~
- ~~(g) ‘durable medium’ means any instrument which enables the consumer or the seller to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;~~
- (f) ‘commercial guarantee’ means any undertaking by the seller or a producer (the guarantor) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not

related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;

- (g) ‘contract’ means an agreement intended to give rise to obligations or other legal effects;
- (h) ‘repair’ means, in the event of lack of conformity, bringing goods into conformity with the contract;
- (i) ‘free of charge’ means free of the necessary costs ~~necessarily~~ incurred in order to bring the goods into conformity, particularly the cost of postage, labour and materials.

### *Article 3*

#### **Level of harmonisation**

Member States shall not maintain or introduce provisions diverging from those laid down in this Directive including more or less stringent provisions to ensure a different level of consumer protection.

### *Article 4*

#### **Conformity with the contract**

1. The seller shall ensure that, in order to conform with the contract, the goods shall, where relevant:
  - (a) be of the quantity, quality and description required by the contract, which includes that where the seller shows a sample or a model to the consumer, the goods shall possess the quality of and correspond to the description of this sample or model;
  - (b) be fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time of the conclusion of the contract and which the seller has accepted; and
  - (c) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms an integral part of the contract.
2. In order to conform with the contract, the goods ~~must~~ shall also meet the requirements of Articles 5, 6 and 7.
3. Any agreement excluding, derogating from or varying the effects of Articles 5 and 6 to the detriment of the consumer ~~is~~ shall be valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and the consumer has expressly accepted this specific condition when concluding the contract.

### *Article 5*

#### **Requirements for conformity of the goods**

The goods shall, where relevant:

- (a) be fit for all the purposes for which goods of the same description would ordinarily be used;

- (b) be delivered along with such accessories including packaging, installation instructions or other instructions as the consumer may expect to receive; and
- (c) possess qualities and performance capabilities which are normal in goods of the same type and which the consumer may expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller or other persons in earlier links of the chain of transactions, including the producer, unless the seller shows that:
  - (i) the seller was not, and could not reasonably have been, aware of the statement in question;
  - (ii) by the time of conclusion of the contract the statement had been corrected; or
  - (iii) the decision to buy the goods could not have been influenced by the statement.

#### *Article 6*

##### **Incorrect installation**

Where the goods are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as lack of conformity with the contract of the goods if:

- (a) the goods were installed by the seller or under the seller's responsibility; or
- (b) the goods, intended to be installed by the consumer, were installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.

#### *Article 7*

##### **Third party rights**

At the time relevant for establishing the conformity with the contract as determined by Article 8, the goods ~~must~~ shall be free from any right of a third party, including based on intellectual property, so that the goods can be used in accordance with the contract.

#### *Article 8*

##### **Relevant time for establishing conformity with the contract**

1. The seller shall be liable for any lack of conformity with the contract which exists at the time when:
  - (a) the consumer or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods; or
  - (b) the goods are handed over to the carrier chosen by the consumer, where that carrier was not proposed by the seller or where the seller proposes no means of carriage.
2. In cases where the goods were installed by the seller or under the seller's responsibility, the time when the installation is complete shall be considered as the time when the consumer has acquired the physical possession of the goods. In a case where the goods were intended to be installed by the consumer, the time when the

consumer had reasonable time for the installation but in any case not later than 30 days after the time indicated in paragraph 1 shall be considered as the time when the consumer has acquired the physical possession of the goods.

3. Any lack of conformity with the contract which becomes apparent within two years from the time indicated in paragraphs 1 and 2 is presumed to have existed at the time indicated in paragraphs 1 and 2 unless this is incompatible with the nature of the goods or with the nature of the lack of conformity.

#### *Article 9*

##### **Consumer's remedies for the lack of conformity with the contract**

1. In the case of a lack of conformity with the contract, the consumer shall be entitled to have the goods brought into conformity by the seller, free of charge, by repair or replacement, in accordance with Article 11.
2. A repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.
3. The consumer shall be entitled to a proportionate reduction of the price in accordance with Article 12 or to terminate the contract in accordance with Article 13 where:
  - (a) a repair or replacement are impossible or unlawful;
  - (b) the seller has not completed repair or replacement within a reasonable time;
  - (c) a repair or replacement would cause significant inconvenience to the consumer;  
or
  - (d) the seller has declared, or it is equally clear from the circumstances, that the seller will not bring the goods in conformity with the contract within a reasonable time.
4. The consumer shall be entitled to withhold the payment of any outstanding part of the price, until the seller has brought the goods into conformity with the contract.
5. The consumer shall not be entitled to a remedy to the extent that the consumer has contributed to the lack of conformity with the contract or its effects.

#### *Article 10*

##### **Replacement of goods**

1. Where the seller remedies the lack of conformity with the contract by replacement, the seller shall take back the replaced goods at the seller's expense unless the parties have agreed otherwise after the lack of conformity with the contract has been brought to the seller's attention by the consumer.
2. Where the consumer had installed the goods in a manner consistent with their nature and purpose, before the lack of conformity with the contract became apparent, the obligation to take back the replaced goods shall include the removal of the non-conforming goods and the installation of replacement goods, or bearing the costs thereof.
3. The consumer shall not be liable to pay for any use made of the replaced goods in the period prior to the replacement.

## *Article 11*

### **Consumer's choice between repair and replacement**

The consumer may choose between repair and replacement unless the option chosen would be impossible, unlawful or, compared to the other option, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including:

- (a) the value the goods would have if there were no lack of conformity with the contract;
- (b) the significance of the lack of conformity with the contract;
- (c) whether the alternative remedy could be completed without significant inconvenience to the consumer.

## *Article 12*

### **Price reduction**

The reduction of price shall be proportionate to the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if in conformity with the contract.

## *Article 13*

### **The consumer's right to terminate the contract**

1. The consumer shall exercise the right to terminate the contract by notice to the seller given by any means.
2. Where the lack of conformity with the contract relates to only some of the goods delivered under the contract and there is a ground for termination of a contract pursuant to Article 9, the consumer may terminate the contract only in relation to those goods and any other goods which the consumer acquired as an accessory to the non-conforming goods.
3. Where the consumer terminates a contract as a whole or in relation to some of the goods delivered under the contract in accordance with paragraph 2:
  - (a) the seller shall reimburse to the consumer the price paid without undue delay and in any event not later than 14 days from receipt of the notice and shall bear the cost of the reimbursement;
  - (b) the consumer shall return, at the seller's expense, to the seller the goods without undue delay and in any event not later than 14 days from sending the notice of termination;
  - (c) where the goods cannot be returned because of destruction or loss, the consumer shall pay to the seller the monetary value which the non-conforming goods would have had at the date when the return was to be made, if they had been kept by the consumer without destruction or loss until that date, unless the destruction or loss has been caused by a lack of conformity of the goods with the contract; and
  - (d) the consumer shall pay for a decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use. The payment for decrease in value shall not exceed the price paid for the goods.

## Article 14

### Time limits

The consumer shall be entitled to a remedy for the a lack of conformity with the contract of the goods where the lack of conformity becomes apparent within two years as from the relevant time for establishing conformity. If, under national legislation, the rights laid down in Article 9 are subject to a limitation period, that period shall not be shorter than two years as from the relevant time for establishing conformity with the contract.

## Article 15

### Commercial guarantees

1. Any commercial guarantee shall be binding on the guarantor under the conditions laid down in:

- (a) pre-contractual information provided by the seller, including any pre-contractual statement which forms an integral part of the contract;
- (b) advertising available at the time of or before the conclusion of the contract; and
- (c) the guarantee statement.

If the guarantee statement is less advantageous to the consumer than the conditions laid down in pre-contractual information provided by the seller or advertising, the commercial guarantee shall be binding under the conditions laid down in the pre-contractual information or advertising relating to the commercial guarantee.

2. The guarantee statement shall be made available on a durable medium and drafted in plain, intelligible language. It shall include the following:

- (a) a clear statement of the legal rights of the consumer as provided for in this Directive and a clear statement that those rights are not affected by the commercial guarantee; and
- (b) the terms of the commercial guarantee that go beyond the legal rights of the consumer, information about the duration, transferability, territorial scope and existence of any charges which the consumer might incur in order to benefit from the commercial guarantee, the name and address of the guarantor and, if different from the guarantor, the person against whom any claim is to be made and the procedure by which the claim is to be made.

~~3.~~ For the purpose of this Article, ‘durable medium’ means any instrument which enables the parties to store information addressed personally to them in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.

~~3.4.~~ Non-compliance with paragraph 2 shall not affect the binding nature of the commercial guarantee for the guarantor.

~~4.5.~~ The Member States may lay down additional rules on other aspects concerning commercial guarantees which are not regulated in this Article insofar as those rules do not reduce the protection set out in this Article.



## Article 16

### Right of redress

Where the seller is liable to the consumer because of a lack of conformity with the contract resulting from an act or omission by a person in earlier links of the chain of transactions, the seller shall be entitled to pursue remedies against the person or persons liable in the chain of transactions. The person against whom the seller may pursue remedies and the relevant actions and conditions of exercise, shall be determined by national law.

## Article 17

### Enforcement

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.
2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions transposing this Directive are applied:
  - (a) public bodies or their representatives;
  - (b) consumer organisations having a legitimate interest in protecting consumers;
  - (c) professional organisations having a legitimate interest in acting.

## Article 18

### Mandatory nature

Any contractual agreement which, to the detriment of the consumer, excludes the application of national measures transposing this Directive, derogates from them or varies their effect before the lack of conformity with the contract of the goods is brought to the seller's attention by the consumer shall not be binding on the consumer unless parties to the contract exclude, derogate from or vary the effects of the requirements of Articles 5 and 6 in accordance with Article 4 (3).

## Article 19

### Amendments to Directive 1999/44/EC, Regulation (EC) No 2006/2004 and Directive 2009/22/EC

~~1. Article 1 of Directive 1999/44/EC is amended as follows:~~

~~(a) paragraph 1 is replaced by the following:~~

~~"1. The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of **contracts for the sale of consumer goods and associated guarantees, which are not distance sales contracts**, in order to ensure a uniform minimum level of consumer protection in the context of the internal market."~~

~~(b) paragraph 2 is amended as follows:~~

~~(i) point (f) is replaced by the following:~~

~~"(f) repair: shall mean, in the event of lack of conformity, bringing consumer goods into conformity with the contract of sale;"~~

(ii) the following point is added:

~~"g) 'distance sales contract' means any sales contract concluded under an organised distance scheme without the simultaneous physical presence of the seller and the consumer, with the exclusive use of one or more means of distance communication, including via internet, up to and including the time at which the contract is concluded"~~

21. In the Annex to Regulation (EC) No 2006/2004, the following point 11 is added replaced by the following:

"22. Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on certain aspects concerning contracts for the ~~online and other~~ distance sales of goods, amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC and repealing Directive 1999/44/EC (OJ...)"

32. In Annex I to Directive 2009/22/EC the following point 7 is added replaced by the following:

"~~167.~~ Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on certain aspects concerning contracts for the ~~online and other~~ distance sales of goods, amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC and repealing Directive 1999/44/EC (OJ...)"

#### Article 20

##### **Transitional provisions**

1. This Directive shall not apply to contracts concluded before [date of two years after the entry into force of this Directive].
2. Member States shall ensure that the laws, regulations and administrative provisions necessary to comply with this Directive apply from [date of two years after the entry into force] to all contracts concluded from that date onwards.

#### Article 21

##### **Repeal of Directive 1999/44/EC of the European Parliament and of the Council**

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees is repealed as of [date of two years after the entry into force]. References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table set out in Annex 1.

#### Article 202

##### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [date of two years after the entry into force] at the latest.

2. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
3. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

*Article 213*

**Entering into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*. However, Article 19 shall apply from [date of two years after the entry into force of this Directive].

*Article 224*

**Addressees**

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

## **COM (2017) 637**

### **Information Note**

#### **1. Proposal**

Amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the sales of goods.

#### **2. Date of Commission document**

31/10/2017.

#### **3. Number of Commission document**

COM (2017) 637.

#### **4. Number of Council document**

13927/17

#### **5. Dealt with in Brussels by**

Justice and Home Affairs Council.  
Working Party on Civil Law Matters.

#### **6. Department with primary responsibility**

Department of Business, Enterprise and Innovation.

#### **7. Other Departments involved**

Department of Justice and Equality.

#### **8. Background to, short summary and aim of the proposal**

The proposed Directive amends the proposal of December 2015 for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods [COM (2015) 635]. The amended proposal extends the scope of the previous proposal to cover all consumer sales contracts in response to concerns expressed by the Council, the European Parliament and stakeholders about the need for coherent and consistent rules covering both online and offline sales. Apart from the extension of its scope, the amended Directive is similar in substance to the proposal of December 2015.

Contracts for the sale of goods by a trader to a consumer are currently regulated at European Union level by Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. This is a minimum harmonisation instrument which permits Member States to maintain or introduce national laws that exceed the consumer protections provided for in the Directive. In the view of the European Commission, the resultant fragmentation of key aspects of consumer contract law means that consumers are unsure and unconfident about their rights when purchases from traders in other EU Member States and are reluctant consequently to engage in such transactions. This fragmentation also makes it more complex and costly for traders to supply goods to consumers in other Member States. The main aim of the proposal is to eliminate certain key contract law barriers to cross-border business-to-consumer trade in goods by establishing fully harmonised rules on consumer rights and remedies in online and other contracts for the sale of goods. Such

rules would reduce the complexity of the legal framework for businesses and the costs incurred as a result of differences in contract law between Member States and would also enhance consumer choice and trust by providing uniform rules with clear consumer rights. These changes would, in the Commission's view, make both consumers and traders more likely to engage in cross-border trade.

Prior to the publication of the proposal of December 2015, the European Commission undertook a public consultation on contract rules for online and other distance sale of goods between June and September 2015. There was also a consultation involving seven meetings with a stakeholder group composed of 22 organisations in 2015 as well as three workshops with national experts from Member States. The amended proposal takes account of additional data collected and surveys of consumers and businesses undertaken for the REFIT Fitness Check on the main EU consumer law Directives which was published in May 2017, and of an impact assessment on the extension of the scope of the proposed Directive on online and other distance sales to all consumer sales contracts undertaken by the European Parliament's Research Service.

### **9. Legal basis of the proposal**

Article 114 of the Treaty on the Functioning of the European Union.

### **10. Voting Method**

QMV.

### **11. Role of the European Parliament**

Co-decision.

### **12. Category of proposal**

Major significance.

### **13. Implications for Ireland & Ireland's Initial View**

Ireland has long-standing statutory provisions on consumer rights and remedies in contracts for the sale of goods under the Sale of Goods Act 1893 and the Sale of Goods and Supply of Services Act 1980. These rights and remedies operate alongside those provided in the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003 (S.I. No. 11 of 2003) which give effect to Directive 1999/44/EC on Certain Aspects of the Sale of Goods and Associated Guarantees. The minimum harmonisation status of that Directive permitted the retention of the provisions of the 1893 and 1980 Acts. Though this resulted in an undesirable degree of regulatory duplication, it has meant that consumers can opt for whichever of the statutory provisions affords them the highest level of protection in any given case.

While Ireland is supportive of the aims of the Commission proposal in view of the undoubted potential for Irish businesses to expand sales to consumers in other EU member states and the potential for enhanced consumer choice, some aspects of the the proposal give cause for concern. If adopted in their current form on a fully harmonised basis, the provisions of the proposed Directive would result in a reduction in some existing consumer rights in Ireland, in particular as regards the right to terminate a sales contract where goods are faulty as a remedy of first and not second

resort and the proposal that consumer remedies for faulty goods would apply only for two years after delivery compared with the current six-year limitation period for contract claims under Irish law. While other aspects of the proposal would enhance consumer rights, it is not clear that they would do so in a way adequate to offset the diminution in consumer rights in these areas. A reasonably satisfactory compromise was achieved on related provisions applying to consumer digital content contracts in the general approach agreed at Council in June 2017 on the proposed directive on contracts for the supply of digital content. It is possible that a broadly similar compromise may also be achievable on the present proposal.

**14. Are there any subsidiarity issues for Ireland?**

The stated objective of the proposal to remove consumer contract law barriers to online trade and to enhance the Digital Single Market for the benefit of businesses and consumers is not an objective that can be achieved by actions at the level of the Member States. Surveys of businesses and consumers suggest in fact that differences in consumer and contract law provisions in Member States are one of a number of factors that make consumers reluctant to buy, and traders reluctant to sell, on a cross-border basis. While it can be argued that the objectives of the proposal do not necessarily require consumer sales within Member States to be regulated at Union level, the advantages to both consumers and businesses of having a single regime of rights and remedies for all sales transactions based on a generally high level of consumer protection would, on balance, appear to outweigh those of a regime that applied different rights and remedies to domestic and cross-border sales.

**15. Anticipated negotiating period**

2017-2018.

**16. Proposed implementation date**

The date of entry into force of the proposal will depend on the progress of the negotiations and cannot be predicted at this point.

**17. Consequences for national legislation**

No decision on implementation measures has been taken at this stage of the proposal.

**18. Method of Transposition into Irish law**

No decision on the method of transposition has been taken at this stage of the proposal.

**19. Anticipated Transposition date**

It is not possible to predict the transposition date at this point.

**20. Consequences for the EU budget in Euros annually**

None.

**21. Contact name, telephone number and e-mail address of official in Department with primary responsibility**

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**Date 23/11/2017**